STATE OF MICHIGAN

IN MICHIGAN SUPREME COURT

On Appeal from the Court of Appeals
SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

JOHN TER BEEK,

Plaintiff/Appellee,

vs.

CITY OF WYOMING

Defendant/Appellant.

Supreme Court Case No. 145816

Court of Appeals Docket No. 306240
LC Case No. 10-011515-CZ

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BRIEF *AMICUS CURIAE* OF STATE BAR OF MICHIGAN PUBLIC CORPORATION LAW SECTION IN SUPPORT OF DEFENDANT-APPELLANT CITY OF WYOMING

Dated: August 17, 2013

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STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT AND GROUNDS FOR APPEAL

Amicus accepts the statements presented by Defendant-Appellant in its Brief.

STATEMENTS OF AMICUS CURIAE STATE BAR PUBLIC CORPORATION LAW SECTION

The State Bar of Michigan Public Corporation Law Section is a standing section of the State Bar of Michigan consisting primarily of attorneys that represent clients that are public corporations, including those who have a direct interest in the significant matters at issue in this case. There are several sections and committees of the State Bar, and statements made in this Brief on behalf of the Public Corporation Law Section are not represented as necessarily reflecting the views of other sections and committees or of the State Bar of Michigan as a whole.

ACKNOWLEDGEMENT

Counsel for amicus curiae wishes to acknowledge the helpful assistance provided in the preparation of this brief by Robert Hamor and Martin Fisher, both students at the Thomas M. Cooley Law School.

STATEMENT OF QUESTIONS PRESENTED

I

WHETHER HARMONIOUS RECONCILIATION OF THE REQUIREMENTS OF THE CITY OF WYOMING ZONING ORDINANCE WITH THE AUTHORIZATION OF ACTIVITIES UNDER THE MICHIGAN MEDICAL MARIHANA ACT MAY BE ACHIEVED BY RECOGNIZING THE TECHNICAL DEFINITIONS SPECIFIED IN THE WYOMING ZONING ORDINANCE.

Appellee ter Beek says "No."
Appellant City says "Yes."
The Court of Appeals said "No."
Amicus says "Yes."
This Court should say "Yes."

II

WHETHER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION APPLIES ON THE BASIS OF BOTH IMPOSSIBILITY AND OBSTACLE CONFLICT PREEMPTION TO VOID THE MICHIGAN MEDICAL MARIHANA ACT IN ITS ENTIRETY.

Appellee ter Beek says "No."
Appellant City says "Yes."
The Court of Appeals said "No."
Amicus says "Yes."
This Court should say "Yes."

STATEMENT OF FACTS

Amicus adopts the Statement of Facts presented by Appellee, City of Wyoming, as provided in its brief.

ARGUMENT

In granting leave to appeal, the Court directed that briefing include two issues:

(1) whether the City of Wyoming zoning ordinance, prohibiting any use that is contrary to federal law, state law, or local ordinance, is subject to state preemption by the Michigan Medical Marihuana Act (MMMA), MCL 333.26421, et seq; and

(2) whether the MMMA is subject to federal preemption by the federal Controlled Substances Act (CSA), 21 USC 801, et seq., on either impossibility or obstacle conflict preemption grounds.

The Court omitted "field preemption" from the list of preemption issues to be briefed. The specification of the issues for briefing, and the omission of field preemption, was implicitly explained in the Court's citation to 21 USC 903, which specifically provides that federal law does not "occupy the field ... to the exclusion of any State law ... unless there is a positive conflict ... so that the two cannot consistently stand together." While it may be argued that section 903 should be interpreted as a Congressional statement of intent against preemption generally, such an argument ignores the last phrase of the section that expressly announces that impossibility and obstacle conflict preemption are to be examined. Indeed, it has been noted that, in reality, section 903 affirmatively prescribes federal preemption whenever state law creates a conflict.[1]

[1] *Gonzales v Oregon,* 546 US 243, 289; 126 S Ct 904; 163 L Ed 2d 748 (2006), Scalia, J, dissenting.

I

THE MICHIGAN ZONING ENABLING ACT AND THE MICHIGAN MEDICAL MARIHUANA ACT ARE ON EQUAL LEGISLATIVE FOOTING. THUS, THE AUTHORIZATION OF ACTIVITES UNDER THE ZEA AND THE AUTHORIZATION UNDER THE MICHIGAN MEDICAL MARIHANA ACT MUST BE HARMONIOUSLY RECONCILED WHERE FEASIBLE. BY RECOGNIZING THE TECHNICAL DEFINITIONS SPECIFIED IN THE WYOMING ZONING ORDINANCE, HARMONIOUS RECONCILIATION IS EASILY ACCOMPLISHED.

The City of Wyoming zoning ordinance provision at issue provides that, "Uses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law, or local ordinance are prohibited."[2] The Court of Appeals interpreted that ordinance provision in relation to federal law, and as applied to the authorization in the MMMA, as follows:

> [The] provisions of the CSA when read together with defendant's zoning ordinance, which makes any violation of federal law an unpermitted use of one's property, cause any medical use of marijuana pursuant to the MMMA on any property within the city of Wyoming to be a violation of defendant's zoning ordinance.[3]

On the basis of this analysis, the Court of Appeals applied state preemption law and determined that the quoted City of Wyoming zoning ordinance provision is preempted by the MMMA.

But the City of Wyoming zoning ordinance must be interpreted in a manner consistent with the terms defined in that ordinance, rather than using otherwise-applicable dictionary meanings, the language of the ordinance and the provisions of the MMMA may be harmoniously reconciled in a manner that avoids the conclusion of preemption reached by the Court of Appeals.

A. <u>The Michigan Zoning Enabling Act</u>

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[2] Wyoming Zoning Ordinance, § 90-66.

[3] *ter Beek v City of Wyoming,* 297 Mich.App. 446, 453-454, 823 N.W.2d 864 (2012).

The Court has had several occasions to discuss the nature and importance of the Michigan Zoning Enabling Act (ZEA). In *Kyser v Kasson Township,*[4] the Court clarified that:

> The ZEA establishes the framework for a local government to create a comprehensive zoning plan to promote the public health, safety, and welfare of the community. MCL 125.3201(1) empowers local legislative bodies to zone for a broad range of purposes and addresses the establishment of land-use districts. In particular, MCL 125.3203(1) pertains to the development of a land-use plan and provides:
>
> > The zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability, to limit the improper use of land, to conserve natural resources and energy, to meet the needs of the state's residents for food, fiber, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to insure that uses of the land shall be situated in appropriate locations and relationships, to avoid the overcrowding of population, to provide adequate light and air, to lessen congestion on the public roads and streets, to reduce hazards to life and property, to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation, and other public requirements, and to conserve the expenditure of funds for public improvements and services to conform with the most advantageous uses of land, resources, and properties. The zoning ordinance shall be made with reasonable consideration to the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources, and the general and appropriate trend and character of land, building, and population development.
>
> These provisions reveal the comprehensive nature of the ZEA. It defines the fundamental structure of a zoning ordinance by requiring a zoning plan to take into account the interests of the entire community and to ensure that a broad range of land uses is permitted within that community. These provisions empower localities to plan for, and regulate, a broad array of land uses, taking into consideration the full range of planning concerns that affect the public health, safety, and welfare of the community. *Burt Twp. v. Dep't of Natural Resources,* 459 Mich. 659, 665-666, 593 N.W.2d 534 (1999).

[4] *Kyser v Kasson Township,* 486 Mich 514, 540-541, 786 N.W.2d 543 (2010).

Consistent with the legislative delegation in the ZEA, the Court in *Schwartz v. City of Flint* recognized that:

> Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general.[5]

The power of local legislative bodies to exercise these value judgments recognized in *Schwartz v City of Flint* is at the very core of a municipality's general policy-making efforts to protect the quality of life for its residents. In *Village of Belle Terre v Boraas*,[6] Justice Marshall, even while dissenting with regard to the effect of a particular zoning regulation in that case, made the following oft-cited observation with regard to the zoning power:

> It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Village of Euclid v Ambler Realty Co*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed.303 (1926), that deference should be given to governmental judgments concerning proper land-use allocation.

The Opinion of the Court in *Kyser*[7] also had occasion to quote from an earlier opinion handed down in *Greater Bible Way Temple of Jackson v. City of Jackson*,[8] as follows:

> A decision whether to rezone property does not involve consideration of only a particular or specific user or only a particular or specific project; rather, it involves the enactment of a new rule of general applicability, a new rule that governs all persons and all projects.

The vital point is that the authority of a community to zone should not be lightly cast aside to accommodate a single interest unrelated to fundamental rights. This is particularly the

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[5] *Schwartz v City of Flint,* 426 Mich. 295, 313; 395 N.W.2d 678 (1986).
[6] *Village of Belle Terre v Boraas,* 416 U.S. 1, 13; 94 S.Ct. 1536; 39 L.Ed.2d 797 (1974).
[7] Id. at 538.
[8] Greater Bible Way Temple of Jackson v. City of Jackson, 478 Mich. 373, 389, 733 N.W.2d 734 (2007).

case in relation to the MMMA considering that under the Michigan Public Health Code (PHC) [9] marihuana is defined as a Schedule 1 controlled substance (where a Schedule I controlled substance, by definition has high potential for abuse with no accepted medical use in treatment, and a lack of accepted safety for use in treatment under medical supervision) and provides that the cultivation, use, and delivery of marihuana all constitute serious criminal acts.

Of course, zoning must abide by the basic rules of state preemption. However, considering that the ZEA is on equal legislative footing with the MMMA, the examination made for the purpose of determining whether state preemption applies must include a complete effort to harmoniously reconcile the zoning ordinance at issue with the purposes of the MMMA. In the interpretation of a statute that provided an exception from a general rule of law (such as MMMA provides from the Public Health Code), the Court of Appeals called upon the rule that, when two statutes can be reconciled and the purpose of each is served, the courts are required to reconcile and enforce them.[10]

B. <u>The City of Wyoming Zoning Ordinance</u>

The zoning ordinance provision at issue specifies that:

> "**Uses** not expressly permitted under this article are prohibited in all districts. **Uses** that are contrary to federal law, state law, or local ordinance are prohibited."[11] (Emphasis supplied).

Understanding this provision requires an inquiry with regard to the term "use." Certainly the zoning ordinance does not expressly detail permission for each and every activity that may be permitted in respective zoning districts. For example, the regulations applicable in a

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[9] MCL 333.7211, 333.7212(1)(c).

[10] *Michigan Millers v. Farm Bureau Gen. Ins. Co.*, 156 Mich.App. 823, 829, 402 N.W.2d 96 (1987).

[11] Wyoming Zoning Ordinance, § 90-66.

residential district would not specify that a person is permitted to eat oatmeal or drink coffee in that district. Does this mean that eating oatmeal or drinking coffee is prohibited in a residential district? Or does the term "use" have a defined meaning that would bring sense to this interpretation?

The Court has clarified that "[w]hen a statute specifically defines a given term, that definition alone controls."[12] Stated in other words by the Court of Appeals in *Detroit v. Muzzin & Vincenti, Inc.*,[13] "Where, as here, a statute supplies its own glossary, courts may not import any other interpretation, but must apply the meaning of the terms as expressly defined." By statutory directive, we are also guided by MCL 8.3a for the construction of statutes:[14] "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

Examining the definition of "use" in the Wyoming Zoning Ordinance reveals that such term has a defined meaning. Specifically, "use" means either a *principal use* of property, e.g., residential, office, commercial, and the like, or an *accessory use* of property, i.e., those activities that are incidental to the principal use. The relevant language of the City of Wyoming Zoning Ordinance[15] reads as follows:

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[12] *Haynes v. Neshewat*, 477 Mich. 29, 35, 729 N.W.2d 488 (2007) (citing *In re Jones Estate*, 52 Mich.App. 628, 636, 218 N.W.2d 89 (1974); *Bennett v. Pitts*, 31 Mich.App. 530, 534, 188 N.W.2d 81 (1971); *W. S. Butterfield Theatres, Inc. v. Dept. of Revenue*, 353 Mich. 345, 91 N.W.2d 269 (1958)).

[13] *Detroit v. Muzzin & Vincenti, Inc.*, 74 Mich.App. 634, 639, 254 N.W.2d 599 (1977).

[14] See MCL 8.3.

[15] Municode Library, Michigan: http://library.municode.com/index.aspx?clientId=10150

Sec. 90-21.

* * *

Use: See "accessory use, building or structure" and/or "principal building or use".

Sec. 90-2.

* * *

Accessory use, building, or structure: A use, building or structure which is clearly incidental to, customarily found in connection with, subordinate to, and located on the same zoning lot as the principal use to which it is related, and devoted exclusively to the main use of the premises.

* * *

90-17.

Principal use (also called a "main use"): The primary use to which the premises are devoted and the primary purpose for which the premises exist.

The most significant characteristic of zoning is that it is intended to plan and organize in functional ways the use of private land – places for residential uses isolated from industry, places for commercial uses on travelled thoroughfares, places for industrial uses located to avoid conflicts with children, and the like. The very first section of the ZEA provides as follows:

> A local unit of government may provide by zoning ordinance for the **regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures** to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, **places of residence, recreation, industry, trade, service,** and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and

efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.[16] (Emphasis supplied).

The Court has had occasion to distinguish "zoning" ordinances from "regulatory" ordinances. For example, in *Square Lake Hills Condominium Association v. Bloomfield Township*,[17] the Court explained:

> Furthermore, we cannot agree with plaintiff's conclusion that ordinance no. 397 is a zoning ordinance because it limits the use of lake frontage based on the number of feet of lake frontage owned. Bloomfield Township ordinance no. 397 is not a zoning ordinance. The ordinance **does not regulate the use of land** or lake frontage. Rather, it regulates an **"activity"** by limiting the number of boats that can be parked or "launched and/or docked adjacent to each separate frontage."
>
> A zoning ordinance is defined as an ordinance which regulates the use of land and buildings according to districts, areas, or locations. 8 McQuillin, Municipal Corporations, § 25.53, p. 137. The question whether or not a particular ordinance is a zoning ordinance may be determined by a consideration of the substance of its provisions and terms, and its relation to the general plan of zoning in the city. (Emphasis supplied)

Within the context of the ZEA, and applying the definitions set out above for interpreting the Wyoming zoning ordinance, a three-part interpretation for activities authorized in the MMMA results under the directive of § 90-66. Specifically: (1) the most significant activity authorized under the MMMA (smoking marihuana in one's residence) is clearly permitted; (2) some MMMA activities, if proposed, would be prohibited; and (3) some MMMA activities require fact-specific analysis to determine the extent to which they are permitted.

1. MMMA activities permitted under § 90-66.

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[16] MCL 125.3201(1).

[17] *Square Lake Hills Condominium Association v. Bloomfield Township*, 437 Mich. 310, 323; 471 N.W.2d 321 (1991).

Applying § 90-66, it is easy to conclude that occupying a residence is a permitted main or **principal residential use** as defined in the zoning ordinance. Smoking cigarettes in one's own home is an **accessory residential use** because such activity is "clearly incidental to, customarily found in connection with, subordinate to, and located on the same zoning lot as the principal use to which it is related, and devoted exclusively to the main use of the premises." ("Incidental and Customary"). Thus, smoking medical marihuana -- essentially the same use of land as smoking cigarettes within the residence, is likewise an **accessory residential use.** Similarly, a physician conducting a general medical practice that includes examinations leading to the issuance of "written certifications"[18] is engaged in a permitted **accessory office use** under the Wyoming zoning ordinance.

Wyoming also provides for "home occupations" as defined in Sec. 90-9:

> **Home occupation**: Any use customarily conducted entirely within the dwelling and carried on by the occupants thereof. It shall not include employees other than members of the immediate family residing within the dwelling. **The use must be clearly incidental and secondary to the dwelling purposes**. It shall not change the character thereof nor endanger the health, safety and welfare of any other person residing in the area because of noise, noxious odors, unsanitary or unsightly conditions, fire hazards and any other similar item, involved in or resulting from such occupation, profession or hobby. Single chair beauty salons, barbershops and instruction in a craft or fine art, are permitted on an individual basis. No article or service shall be sold or offered for sale on the premises except as is produced by such occupation. Such occupation shall not require any alterations or construction features, equipment, machinery, outdoor storage or signs not permitted in the residential areas. No home occupation shall generate more than the normal residential traffic either in amount or type. One nonilluminated nameplate, not more than two square feet in area, may be attached to the building and shall contain only the name and occupation of the residents of the premises. Day care centers, tea rooms, veterinarian's offices, tourist homes, animal hospitals, and kennels and any other similar businesses or occupations shall not be deemed to be home occupations. (Emphasis supplied)

[18] MCL 333.26423(l).

A home occupation is expressly authorized to be a permitted **accessory residential use** in the residential zoning district.[19] This accessory residential use can certainly be utilized to some degree under the MMMA depending on the specific circumstances.

These examples of "uses" **for zoning and land use purposes,** as defined in the zoning ordinance, are residential and office uses, which are not contrary to § 90-66 because neither residential use nor office use is "contrary to federal law." Thus it may not be said under any circumstances that the ordinance prohibits all uses permitted by the MMMA. Indeed, smoking medical marihuana within a residence is undoubtedly one of the most fundamental uses authorized in the MMMA.

2. MMMA activities prohibited under § 90-66.

On the other hand, suppose a residential structure in a residential zoning district is not being utilized for a home, but is employed solely for the transfer/delivery of medical marihuana. This is neither a permitted principal nor an accessory use of residentially classified property. It is not a *residential use* because the property is not being used as a residence. Nor can the activity be considered as being a residential accessory use, because the activity is not accessory to a primary use of property for a residence. Thus, the activity is not subsumed within the meaning of a "use" as defined in the zoning ordinance. Rather, it simply defaults to a 'use' as defined by federal law in the CSA. Considering that delivery of marihuana is prohibited under the CSA, it is a use which is "contrary to federal law," and thus prohibited under zoning ordinance § 90-66.

3. MMMA activities that require fact-specific analysis.

[19] See, e.g., § 90-96(7), specifying principal permitted uses in the R-1, R-2, and ER residential districts.

Between these clear examples of "uses" defined in the ordinance that are permitted under § 90-66, and activities that are not within the definition of the term "use" under the ordinance, there are certain MMMA activities that would require fact-specific analysis to determine whether they are permitted. The analysis is based on the Incidental and Customary standard for "accessory uses." For example, would a person growing several plants in a room (an enclosed, locked facility) within a residence be Incidental and Customary? There are various factors to consider in making that decision, such as whether the size and design of the particular home includes a room in which such activity would be Incidental and Customary. Also relevant is whether fire and electrical codes – to accommodate any special electrical demands for tropical lighting – could be normally and customarily met in a particular home. This analysis brings into focus one of the significant shortcomings of the MMMA: its failure to make any provision for how a patient or caregiver may acquire plants or usable medical marihuana in the first instance. The existence of gray areas in the Wyoming zoning ordinance should not be deemed to be a greater problem due to this shortcoming in the MMMA. At least under the zoning ordinance, there are means of resolving the gray areas by interpretation, whereas there is no apparent lawful basis for resolving the shortcoming in the MMMA. In all events, growing several plants in a room within some homes would almost certainly be Incidental and Customary, meaning that even in the gray area situations, the ordinance does not prohibit throughout the City the uses authorized under the MMMA.

C. <u>Application of the Wyoming Zoning Ordinance to the Purposes of the MMMA</u>

As clarified above, zoning objectives are intended to be achieved under the ZEA by dividing a community into several zoning districts, organized in a manner that will promote and

protect the public health, safety, and welfare.[20] Clearly, the Wyoming zoning ordinance broadly permits fundamental activities authorized in the MMMA, but in some circumstances places restrictions on MMMA activities. This is quite comparable to most lawful activities. However, it is critical to analyze the Wyoming zoning ordinance with the appropriate definitional propositions in mind to determine whether it prevents the achievement of the purposes of the MAMA, keeping in mind that the MMMA does not specify that activities authorized in the statute must be free of reasonable regulation.

"The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana." To meet this end, the MMMA defines the parameters of authorized medical-marijuana use, and promulgates a scheme for regulating registered patient use and administering the act.[21] For "use" purposes under the Wyoming zoning ordinance there is no basis for concluding that a qualifying patient under the MMMA can not use medical marihuana in his or her residence in the same manner that such a person may smoke a cigarette. This activity would amounts to an accessory residential use. Accessory residential uses are permissible in a district in which residences are the principal use permitted, i.e., in a residential zoning district. Thus, the activity that is undoubtedly the most significant to achieve the purpose of the MAMA is not prohibited by the City of Wyoming zoning ordinance.

The ordinance may impose regulatory requirements on MMMA authorized activities depending on how clearly such activities may be classified as accessory uses in one of the

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[20] *Hess v Charter Township of West Bloomfield,* 439 Mich. 550; 486 N.W.2d 628 (1992); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Village of Belle Terre v Boraas, supra.*

[21] *People v. Carruthers,* ___ Mich App ___, ___ N.W.2d ___, [2013 WL 3481343] (2013), citing *People v. Kolanek*, 491 Mich. 382, 393-394; 817 NW2d 528 (2012).

authorized zoning districts. Again, however, the MMMA does not specify that activities authorized in the statute must be free of reasonable regulation. Moreover, placing reasonable limitations on otherwise lawful uses is not a basis for preemption. Rather, as instructed in *Rental Property Owners Assn. v City of Grand Rapids*,[22] the proper test is whether the ordinance **prohibits** an act which the statute permits, or permits an act which the statute prohibits. A municipality may impose additional requirements than the state as long as there is no conflict between the two.

There is little question in the final analysis that individuals may carry out the purposes of the MMMA in the City of Wyoming, and while the zoning ordinance imposes regulation on uses under the MMMA – and substantially all other uses, it does not prohibit that which the MMMA permits, or permit an act which the MMMA prohibits.

D. <u>Conclusion</u>

It should be resoundingly agreed that "whether a state statute preempts a local ordinance is a question of statutory interpretation and, therefore, a question of law that we review de novo."[23] Therefore, the issue of preemption must be decided based upon an analysis of the law of preemption as applied to an interpretation of the City of Wyoming Zoning Ordinance in relation to the purposes of the MMMA.

Applying the law of preemption to the City of Wyoming Zoning Ordinance in relation to the purposes of the MMMA, it is clear that the zoning ordinance does not broadly prohibit that

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[22] *Rental Property Owners Association v City of Grand Rapids*, 455 Mich 246, 257 (1997); see also, *People v Llewellyn*, 401 Mich 314, 257 NW2d 902 (1977).

[23] *Michigan Coalition for Responsible Gun Owners v. City of Ferndale*, 256 Mich.App. 401, 405, 662 N.W.2d 864 (2003).

which the MMMA permits, or permit an act which the MMMA prohibits. The purposes of the MMMA may be achieved subject to customary land use regulation.

Accordingly, the legal conclusion that the Wyoming Zoning Ordinance is preempted by the MMMA should be reversed.

II.

THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION APPLIES ON THE BASIS OF BOTH IMPOSSIBILITY AND OBSTACLE CONFLICT PREEMPTION TO VOID THE MICHIGAN MEDICAL MARIHANA ACT IN ITS ENTIRETY.

The main thrust of the position being advanced by Amicus is that the MMMA should be found to be preempted, with the view that such holding should be followed by an attempt by the Michigan Legislature, working with the federal government, to fashion an appropriate, controlled, and narrow scheme of authorization for medical marihuana use that does not violate the Supremacy Clause, and thus lawfully assist those with defined chronic pain under the care of a physician.

The MMMA was enacted by the process of initiative, and not developed with input from stakeholders such as federal, state, and local law enforcement. The statute is ambiguous and fosters – indeed requires – problems in law enforcement that are obstructions important to the purpose of the CSA. Likewise, the statute allows wide-spread use of marihuana, including usage by minors, again contradicting a central purpose of the Congress in enacting the CSA -- drug abuse prevention. Amicus does not hide from the fact that there is popular support to allow medical marijuana usage for the benefit of those who are seriously suffering from legitimate and defined chronic disease. However, we do not have a statute that meets the assumptions for this

popular support, and the only apparent means of securing a statute that does not unreasonably obstruct law enforcement and unreasonably obstruct efforts to curb drug abuse is to invalidate the initiated law and return to the legislative drawing board.

A. SURPEMACY CLAUSE BACKGROUND

The Supremacy Clause[24] reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The history of this clause is insightful, as recounted by the Supreme Court:

> Enforcement of federal laws by state courts did not go unchallenged. Violent public controversies existed throughout the first part of the Nineteenth Century until the 1860's concerning the extent of the constitutional supremacy of the Federal Government. During that period there were instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so. But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. Claflin v. Houseman, 93 U.S. 130, 23 L.Ed. 833. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing in the Constitution or Laws of any State to the contrary notwithstanding.[25]

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[24] United States Constitution, Article VI, Clause 2.

[25] *Testa v. Katt*, 330 U.S. 386, 390-391, 67 S.Ct. 810, 172 A.L.R. 225, 91 L.Ed. 967 (1947).

In terms of the breadth and application of the Supremacy Clause, the Supreme Court has had occasion to observe that:

> Article VI, cl. 2, of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Consistent with that command, we have long recognized that **state laws that conflict with federal law are "without effect**." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).[26]
> (Emphasis supplied)

Addressing the conflict between state and federal law in terms of drug enforcement, the Supreme Court's expressed view is that, "[t]he purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls."[27] With similar import with regard to marihuana, the Court has stated that:

> [L]imiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is " 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' " however legitimate or dire those necessities may be.[28]

The MMMA authorizes the medical use of marihuana, including its use (possession), cultivation (manufacture), and transfer (delivery), subject to compliance with the conditions of the Act.[29] Contrary to such authorization, the CSA like the general rule of law in Michigan as

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[26] *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008).
[27] *U.S. v. Allegheny County, Pa.*, 322 U.S. 174, 183, 64 S.Ct. 908, 88 L.Ed. 1209 (1944).
[28] *Gonzales v Raich,* 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).
[29] *People v Bylsma,* 493 Mich. 17, 21, 825 N.W.2d 543 (2012).

specified in the Michigan Public Health Code,[30] classifies marihuana – medical and otherwise – as a Schedule 1 controlled substance,[31] and specifies that its possession, manufacture, and delivery are all unlawful acts.[32]

B. IMPOSSIBILITY PREEMPTION

Impossibility preemption was discussed in *Mutual Pharmaceutical Co., Inc. v Bartlett*[33] ("*Mutual*"), released on June 24, 2013. The Court pointed out in *Mutual* that:

> The Supremacy Clause provides that the laws and treaties of the United States "shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Accordingly, it has long been settled that state laws that conflict with federal law are "without effect." Maryland v. Louisiana, 451 U.S., at 746, 101 S.Ct. 2114; McCulloch v. Maryland, 4 Wheat. 316, 427, 4 L.Ed. 579 (1819). See also Gade v. National Solid Wastes Management Assn., 505 U.S. 88, 108, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield" (internal quotation marks omitted)).
>
> Even in the absence of an express pre-emption provision, **the Court has found state law to be impliedly pre-empted where it is "impossible for a private party to comply with both state and federal requirements.**" English v. General Elec. Co., 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). See also Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce").[34] (Emphasis supplied).

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[30] MCL 333.7211, 333.7212(1)(c).
[31] 21 U.S.C. § 812(c)(10)
[32] 21 U.S.C. § 841(a)(1)
[33] *Mutual Pharmaceutical Co., Inc. v Bartlett*, 133 S.Ct. 2466 (June 24, 2013).
[34] Id. at 2472-2473

In *People v Bylsma,*[35] the Court reiterated that, "The MMMA **authorizes "[t]he medical use of marihuana** ... to the extent that it is carried out in accordance with [its] provisions...." (Emphasis supplied). Earlier, in *People v Kolanek,* the Court pronounced that:

> The purpose of the MMMA is to **allow a limited class of individuals the medical use of marijuana**, and the act declares this purpose to be an "effort for the health and welfare of [Michigan] citizens." To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA.
>
> The MMMA **does not create a general right** for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use "is carried out in accordance with the provisions of [the MMMA]."[36] (Emphasis supplied).

Thus, while the MMMA does not declare that the medical use of marihuana is "legal," and does not create a general right of use, the Court has recognized that the protections of the MMMA are such that this law has the effect of creating an "**authorization**" for, and "**allows**" use of, marihuana. On the other hand, as noted above, the CSA specifies that possession, manufacture, and delivery of marihuana are all unlawful.

It would seem inescapable that a person exercising the authorization under the MMMA to possess, cultivate, or transfer medical marihuana could not possibly remain in compliance with the CSA. By exercising such authorization under MMMA, it is physically impossible to avoid violation of the federal law specified in CSA.

In the face of such physical impossibility, the Michigan Court of Appeals in this case concluded that preemption is avoided here by engaging in an **unrealistic fiction**:

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[35] *People v Bylsma,* 493 Mich. 17, 21, 825 N.W.2d 543 (2012).
[36] *People v. Kolanek*, 491 Mich. 382, 393-394, 817 N.W.2d 528 (2012)

> Impossibility conflict preemption requires a finding that "compliance with both federal and state regulations is a physical impossibility...." Boggs v. Boggs, 520 U.S. 833, 844, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) (quotation marks and citation omitted). The United States Supreme Court has held that it **is not physically impossible to comply with logically inconsistent statutes when a person can simply refrain from doing the activity that one statute purports to permit and the other statute purports to proscribe.** See, e.g., Barnett Bank v. Nelson, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996) (finding that preemption on the basis of impossibility inapplicable when a federal statute authorized national banks to do something that state law prohibited).
>
> As noted previously, the CSA proscribes marijuana in all forms, medicinal or otherwise. The MMMA, however, permits, but does not mandate, medical use of marijuana in limited circumstances and grants immunity from penalties or prosecutions to qualified and registered patients. Because the medical use permitted by the MMMA is not mandatory, it is not physically impossible to comply with both statutes simultaneously. Thus, we conclude that because it is not physically impossible to comply with both the MMMA and the CSA at the same time, the MMMA is not preempted by the CSA on the basis of impossibility conflict preemption. (Emphasis supplied).[37]

Although the entire purpose of the MMMA is to allow a limited number of people in the state to engage in the medical use of marihuana, the Court of Appeals held that, for impossibility preemption purposes, we must engage in the **fiction** that people will not participate in medical use, and thus will not secure the benefits of the MMMA. Perhaps taking into consideration the point that this type of fiction is not deserving of support, the U.S. Supreme Court in *Mutual* rejected it.

Mutual involved a plaintiff with very serious damages sustained as a result of an inadequate warning on the label of the container cautioning of the potential harmful effects of a particular generic drug. The generic drug manufacturer was bound under federal law to utilize the same warning label as that which had been approved by the Food and Drug Administration.

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[37] *ter Beek v City of Wyoming,* 297 Mich.App. 446, 459, 823 N.W.2d 864 (2012).

State law required the generic drug manufacturer to change the label to provide stronger warnings. Thus, the state was requiring that which the federal government would not permit.

In response to this situation, the Circuit Court of Appeals and a dissenting opinion filed in the Supreme Court took a position similar to the Michigan Court of Appeals in this case, namely, that the generic manufacturer could avoid the conflict if it simply **stopped selling** the generic drug.

Although the stakes were very high in finding preemption (the injuries suffered by the Plaintiff resulted in a verdict of over $21 million, which would be set aside by a preemption holding), the Supreme Court concluded that the rule of law must prevail, and the "ability to stop selling does not turn impossibility into possibility."[38]

Speaking in greater detail on this point, the Court stated:

> The Court of Appeals reasoned that Mutual could escape the impossibility of complying with both its federal- and state-law duties by "choos[ing] not to make [the generic] at all." . . . **We reject this "stop-selling" rationale** as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, **if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be "all but meaningless."** (Emphasis supplied, and citations omitted)

This holding **removes the fiction** required to support the holding of the Court of Appeals in this case. *Mutual* squarely rejected the option employed by the Court of Appeals to simply **stop using** medical marihuana in order to avoid the conflict.

As the Court of Appeals noted, unlike the state law in *Mutual,* there is an authorization, but no affirmative requirement in the MMMA to use medical marihuana. While this is distinct

[38] *Mutual, supra,* at 2477.

from the state law in *Mutual,* that required action, this should be considered a distinction without a meaningful difference. For purposes of either the "**no-sell**" argument presented in *Mutual* or the "**no-use**" argument adopted by the Court of Appeals in this case, the assertion that preemption does not apply requires acceptance of the same fiction. The Court in *Mutual* rejected that fiction, clarifying that, "if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be all but meaningless."

Accordingly, it must be held that it is physically impossible to exercise the authorization in MMMA and also comply with the CSA. Impossibility preemption should be found to apply, and the holding of the Michigan Court of Appeals that impossibility preemption does not apply must be reversed.

C. OBSTACLE CONFLICT PREEMPTION

Even if the Court decides that impossibility preemption does not apply, *Hillman v Maretta* instructs that "State law is pre-empted 'to the extent of any conflict with a federal statute.' . . . Such a conflict occurs . . . when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[39] *Hillman* was decided by the U.S. Supreme Court on June 3, 2013.

Hillman involved a dispute on whether state or federal law governs the manner in which a particular designation of a beneficiary on a Federal Employees' Group Life Insurance Policy is made. Application of state law would result in the designation of one beneficiary under the life insurance policy, and application of federal law would result in the designation of a different beneficiary. The Court noted that the legal context in which this dispute arose involves domestic relations – an area of law traditionally in the domain of state law. On the basis of this traditional state law context the Court

[39] *Hillman v Maretta,* 133 S.Ct. 1943, 1949-1950 (June 3, 2013).

further noted that there is a "presumption against preemption . . ., and family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law will be overridden,' . . ."[40] Yet, the Court found the state law to be preempted.

It is fair to acknowledge that the MMMA regulation in the present case is grounded in the state's police power. Therefore, as in *Hillman,* it is necessary to find clear and substantial federal interests that are significantly damaged before obstacle conflict preemption can be found. Thus, it is important to begin this analysis by examining the nature and importance of the federal interests at stake under the CSA. "The nature of the federal interest must first be ascertained."[41]

In *Gonzales v Raich,*[42] the Court pointed out that "[t]he main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Raich* also referred to findings made by Congress in enacting the CSA, including a finding that is most critical to this case:

> **Federal control of the intrastate incidents of the traffic in controlled substances is essential** to the effective control of the interstate incidents of such traffic." 21 U.S.C. §§ 801(1)-(6).[43]

In other words, the interest of Congress in the CSA extends to regulation and control – and extinguishment of Schedule I drug activities – within the borders of states, and this objective is **essential.**

House of Representatives Report No. 1444 provides a record relating to the enactment of the CSA.[44] Selected portions of H.R.Rep No. 1444 are set forth on Attachment A to this Brief, including the principal purpose of the Bill:

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[40] Id. (internal quotation marks omitted).
[41] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-373, 120 S. Ct. 2288, 2294, 147 L. Ed. 2d 352 (2000).
[42] *Raich,* at 13.
[43] Id. at fn 20.

PRINCIPAL PURPOSE OF THE BILL

> THIS LEGISLATION IS DESIGNED TO DEAL IN A COMPREHENSIVE FASHION WITH THE GROWING MENACE OF DRUG ABUSE IN THE UNITED STATES (1) THROUGH **PROVIDING AUTHORITY FOR INCREASED EFFORTS IN DRUG ABUSE PREVENTION** AND REHABILITATION OF USERS, (2) THROUGH PROVIDING **MORE EFFECTIVE MEANS FOR LAW ENFORCEMENT** ASPECTS OF DRUG ABUSE PREVENTION AND CONTROL, AND (3) BY PROVIDING FOR AN OVERALL BALANCED SCHEME OF CRIMINAL PENALTIES FOR OFFENSES INVOLVING DRUGS. (Emphasis supplied).

In evaluating obstacle conflict preemption, *Hillman* provides a two-factor format:[45] The first factor requires an analysis of the nature of the federal interest. If the interest in upholding the federal statute is only a matter of *convenience*, this would be insufficient for preemption in an area of traditional state law. However, if preserving the rule in the federal statute is important in order to provide a specific, predictable scheme of regulation, this may lead to preemption. The second factor examines whether congress has explicitly enumerated exceptions to the scheme of regulation, and whether the state law at issue would be consistent with the exceptions.

1. The Nature of the Federal Interest.

Examining the first *Hillman* factor, the analysis above makes clear that the CSA is intended to carry out an important mission. There are two principal objectives associated with the enactment of the CSA, each one establishing a specific, predictable scheme of regulation. As clarified by H.H.Rep No. 1444, recognizing the "growing menace of drug abuse in the United States," the principal purpose for enacting the CSA included two fundamental objectives: **(1) to enhance efforts in drug abuse prevention; and (2) to provide more effective law**

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[44] H.R. REP. 91-1444, H.R. Rep. No. 1444, 91ST Cong., 2ND Sess. 1970, 1970 U.S.C.C.A.N. 4566, 1970 WL 5971 (Leg.Hist.).
[45] *Hillman,* at 1946.

enforcement for drug abuse prevention and control. The MMMA is a direct obstacle to both of these clear and substantial federal purposes and objectives. While the Court could conclude that the obstruction created by the MMMA to achieving *either* of these federal purposes in Michigan is sufficient to support a conclusion of obstacle conflict preemption, there is no doubt that considering *both* of these obstacles together provides an overwhelmingly strong basis for that conclusion.

a. The MMMA is an Obstacle to Drug Abuse Prevention

At the time of enactment of the CSA, H.R.Rep No. 1444 reported the following statement of the extent of the drug abuse problem, particularly relating to marihuana.

> EXTENT OF THE PROBLEM
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> * * *
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> SINCE DRUG ABUSE INVOLVES ILLEGAL ACTIVITIES UNDER BOTH STATE AND FEDERAL LAW, RELIABLE STATISTICS CANNOT BE OBTAINED ON THE ACTUAL EXTENT OF DRUG ABUSE IN THE UNITED STATES; HOWEVER, IT IS APPARENT THAT THE **EXTENT OF DRUG ABUSE, PARTICULARLY AMONG THE YOUNG, IS INCREASING** GREATLY. ESTIMATES ARE THAT BETWEEN 8 AND 12 MILLION PERSONS HAVE TRIED MARIHUANA. STUDIES INVOLVING SOME **COLLEGES AND GRADUATE SCHOOLS** INDICATE THAT **50 PERCENT OR MORE OF THE STUDENTS HAVE ABUSED DRUGS AT ONE TIME OR ANOTHER**; AND TESTIMONY BEFORE THE COMMITTEE IN HEARINGS ON THIS AND OTHER LEGISLATION HAS INDICATED THAT **SUBSTANTIAL NUMBERS OF HIGH SCHOOL STUDENTS AND IN SOME CASES GRAMMAR SCHOOL STUDENTS ARE INVOLVED IN THE ABUSE OF DRUGS.**
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> * * *

> TESTIMONY FURTHER INDICATED THAT HALLUCINOGENICS ACCOUNTED FOR THE GREATEST SINGLE INCREASE IN DRUG OFFENSES IN THE UNITED STATES. **PROBABLY THE MOST WIDELY ABUSED DRUG IN THIS CLASS WAS MARIHUANA**, WHICH ACCOUNTED FOR MOST OF THE 64-PERCENT INCREASE IN TOTAL NARCOTIC AND MARIHUANA ARRESTS BETWEEN 1967 AND 1968. THE RECENT FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS INDICATED THAT **INSTANCES OF MARIHUANA VIOLATIONS HAD RISEN 200 PERCENT BETWEEN 1967 AND 1969. IT WAS ALSO ESTIMATED THAT *4573 IN CERTAIN HIGH SCHOOL AND COLLEGE ENVIRONMENTS, OVER 50 PERCENT OF ALL THE STUDENTS HAD HAD SOME EXPERIENCE WITH MARIHUANA.**

Consistent with the Bill reported by H.R.Rep No. 1444, the CSA classified marihuana as a Schedule I controlled substance, as explained in *Gonzales v Raich*:

> In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway." Schedule I drugs are categorized as such because of their **high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.**[46] (Emphasis supplied).

While the classification of marihuana as a Schedule I controlled substance occurred in 1970, H.H.Rep No. 1444 reported that such classification was subject to adjustment based on studies then underway. Moreover, the Court in *Raich* pointed out in 2005, some 35 years following enactment of the CSA, and only 3 years prior to the adoption of the MMMA, that:

> The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules. § 811. **Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.**[47] (Emphasis supplied).

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[46] *Gonzales v Raich,* at 14.

[47] Id. at 14-15.

It is also relevant that the State of Michigan accepted and adopted the Schedule I classification, as enacted in the Public Health Code. This Schedule I classification also remains in place.

Thus, we have marihuana classified as having a high potential for abuse, a lack of any accepted medical use, and an absence of any accepted safety for use in medically supervised treatment. Concurrent with the establishment of the classification of marihuana in this manner, Congress enacted the CSA for the purpose of enhancing efforts in drug abuse prevention. In the face of this clear and substantial federal objective, the MMMA has been passed by the process of initiative to **authorize** the use, cultivation, and transfer of this Schedule I drug.

The MMMA not only authorizes use of marihuana by adults, but minors are expressly authorized to use medical marihuana under the registration standards of the Act.[48] Minors are the most vulnerable, and were the object of Congressional concern in the enactment of the CSA, as noted in H.H.R. No. 1444. To exacerbate the authorization to adults and minors, there is a low threshold under the MMMA for securing the authorization to use marihuana, making this drug readily available. The threshold, in essence, is to have a "debilitating medical condition." While such condition is described in terms of a number of alternative specified conditions, a fair reading of MMMA permits the use of marihuana based on "severe and chronic pain" arising out of a "medical condition." This ambiguous threshold is effectively a giant leap toward deregulating a drug determined by Congress to have a high potential for abuse, a lack of any accepted medical use, and an absence of any accepted safety for use in medically supervised treatment.

[48] MCL 333.26426(b).

Presumably, studies and other considerations have occurred with regard to the CSA schedules for the various drugs, including marihuana. If there had been a change in the conclusion that marihuana has "high potential for abuse, a lack of any accepted medical use, and an absence of any accepted safety for use in medically supervised treatment," there would have been a reclassification during the last 42 years.

Considering the background and meaning of the CSA Schedule I classification for marihuana, and the object and purpose of Congress in enacting the CSA to prevent drug abuse, and the low threshold under the MMMA for gaining access to the drug by adults and minors, the continued effectiveness of the MMMA causes major damage to the clear and substantial federal interest of drug abuse prevention embodied in the CSA. There can be little question that the MMMA stands as an obstacle to the accomplishment and execution of a robust pursuit of drug abuse prevention purposes and objectives Congress intended in the CSA.

On this independent ground, the MMMA should be determined to be preempted on obstacle conflict grounds.

b. The MMMA is an Obstacle to Law Enforcement for Drug Abuse Prevention and Control.

Should the Court decide that the obstruction to drug abuse prevention due to the marihuana use authorization in the MMMA is not sufficient to find preemption, combining such obstruction with the hurdles created to effective law enforcement for drug abuse prevention and control certainly meets the demanding test.

H.R.Rep No. 1444 clarifies that:

> THE BILL IS DESIGNED TO IMPROVE THE ADMINISTRATION AND REGULATION OF THE MANUFACTURING, DISTRIBUTION, AND DISPENSING OF CONTROLLED SUBSTANCES BY **PROVIDING FOR A**

'CLOSED' SYSTEM OF DRUG DISTRIBUTION FOR LEGITIMATE *4572 **HANDLERS OF SUCH DRUGS. SUCH A CLOSED SYSTEM SHOULD SIGNIFICANTLY REDUCE THE WIDESPREAD DIVERSION OF THESE DRUGS OUT OF LEGITIMATE CHANNELS INTO THE ILLICIT MARKET**, WHILE AT THE SAME TIME PROVIDING THE LEGITIMATE DRUG INDUSTRY WITH A UNIFIED APPROACH TO NARCOTIC AND DANGEROUS DRUG CONTROL.

In *Emerald Steel Fabricators, Inc. v Bureau of Labor and Industries*,[49] the Supreme Court of the State of Oregon faced the Supremacy Clause issue head-on in connection with that state's medical marihuana exception. The Court's analysis, which has relevance to the Michigan situation, started with a review of the federal Controlled Substances Act, reciting that,

> The central objectives of that act "were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. **Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels."** . . . To accomplish those objectives, Congress created a comprehensive, **closed regulatory regime** that criminalizes the unauthorized manufacture, distribution, dispensation, and possession of controlled substances classified in five schedules.
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> * * *
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> Schedule I controlled substances lack any accepted medical use, federal law prohibits *all* use of those drugs "with the sole exception being use of [Schedule I] drug[s] as part of a Food and Drug Administration preapproved research project.". . . Congress has classified marijuana as a Schedule I drug, 21 U.S.C. § 812(c), and federal law prohibits its manufacture, distribution, and possession, 21 U.S.C. § 841(a)(1).[50] (Emphasis supplied)

With regard to the conflict between state and federal law in terms of drug enforcement, the U.S. Supreme Court clarified that, "[t]he purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's

[49] 348 Or. 159, 230 P.3d 518 (2010).

[50] *Id* at 173-174.

general authority were subject to local controls."[51] As it relates to marihuana, the Court in *Raich* held that:

> [L]imiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is " 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' " however legitimate or dire those necessities may be.[52]

Reflecting both an intent to control *intrastate* marihuana activity, and the importance of law enforcement on this subject, the *Raich* Court went on to state:

> Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.[53]

More directly emphasizing the important purpose and object of **control** within a **"closed system"** to avoid diversion of drugs from what might be a **legitimate** system (such as that purported in the MMMA) **to the illegitimate**, *Raich* clarified that:

> The **main objectives** of the CSA were to **conquer drug abuse** and to **control the legitimate and illegitimate traffic** in controlled substances. Congress was particularly concerned with the **need to prevent the diversion of drugs from legitimate to illicit** channels.[54] (Emphasis supplied).

The picture could not be sharper: in achieving the objective of the CSA to control drug abuse, **unobstructed law enforcement was deemed to be a critical element to promote and maintain.** So what obstruction to law enforcement does the MMMA present? The statute itself makes this abundantly clear.

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[51] *U.S. v. Allegheny County, Pa.*, 322 U.S. 174, 183, 64 S.Ct. 908, 88 L.Ed. 1209 (1944).
[52] *Raich, supra,* at 29.
[53] Id. at 22.
[54] Id., at 12-13.

Section 6 of the MMMA[55] makes provision for the process of registration of qualifying patients and primary caregivers, and also specifies the confidentiality of the information contained in the registration records. The information required to be included in the records includes: name, address, and date of birth of the qualifying patient, name, address, and date of birth of the qualifying patient's primary caregiver, if any, and if the qualifying patient designates a primary caregiver, a designation as to whether the qualifying patient or primary caregiver will be allowed under state law to possess marihuana plants for the qualifying patient's medical use.[56] **This information collected in the state files is all extremely valuable for federal officials to carry out the clear and substantial objective of law enforcement for drug abuse prevention and control,** including avoidance of the diversion of drugs from what might be a legitimate system (such as that purported in the MMMA) to the illegitimate. This is where the MMMA creates a major obstruction.

Section 6 establishes the following confidentiality rules with regard to the registration records:

> (h) The following confidentiality rules shall apply:
>
> (1) Applications and supporting information submitted by qualifying patients, including information regarding their primary caregivers and physicians, are confidential.
>
> (2) The department shall maintain a confidential list of the persons to whom the department has issued registry identification cards. Individual names and other identifying information on the list is confidential and is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.
>
> (3) The department shall **verify to law enforcement personnel whether a registry identification card is valid, without disclosing more information**

[55] MCL 333.26426.
[56] MCL 333.26426(a)(3), (5), and (6).

than is reasonably necessary to verify the authenticity of the registry identification card.

(4) A person, including an employee or official of the department or another state agency or local unit of government, who discloses confidential information in violation of this act is guilty of a misdemeanor, punishable by imprisonment for not more than 6 months, or a fine of not more than $1, 000.00, or both. Notwithstanding this provision, department employees may notify law enforcement about falsified or fraudulent information submitted to the department. (Emphasis supplied).

For purposes of the present inquiry, law enforcement encounters many hurdles in apprehending a person violating drug laws – in many instances with officers' lives at risk. Having information that includes the identity and location of persons who might be engaged in CSA violations would be invaluable. It is precisely this information that the MMMA requires withheld both with regard to those in possession as well as primary caregivers who are engaged in delivery of marihuana to one or more users. Viewed through the lens of federal officers, this withholding of information has the obvious impact of meaningfully obstructing drug abuse prevention and control. Very simply, the MMMA forbids, under penalty of criminal prosecution, any state or local employee or official from disclosing information that would be invaluable – and perhaps life-saving – to law enforcement. Stated in other words, the MMMA directly obstructs the efforts of federal law enforcement in carrying out the main objectives of the CSA. Stated in still other words, **the MMMA mandates that state and local employees and officials aid and abet persons who are engaged in criminal enterprise by directing that critical information be withheld.**

Federal law[57] provides that [w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a

[57] 18 U.S.C.A. § 2(a).

principal. U.S. Code provisions on Drug Abuse Prevention and Control,[58] provide that, [a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. Although not related to public officials, the referenced section on Drug Abuse Prevention and Control has been unsuccessfully challenged in an indictment of a person charged with conspiracy, possession with intent to distribute and aiding and abetting unlawful distribution of cocaine (which, like marihuana, is a Schedule 1 controlled substance).[59] While an official may attempt to seek shelter under 21 USC 885(d), which provides immunity to officials who are "lawfully engaged" in the enforcement of any law or municipal ordinance relating to controlled substances, a federal court in California[60] held that, for an official to be "lawfully engaged" in the enforcement of a law relating to controlled substances, and therefore entitled to immunity, **the law which the municipal official is "enforcing" must itself be consistent with federal law.**

Some would argue that this argument is circuitous in that individuals would not register if they knew the information would be disclosed to federal law enforcement, and thus the information would not be available to provide. However, federal law establishes a clear and predictable scheme of enforcement, and the MMMA itself expressly states that "federal law currently prohibits any use of marihuana except under very limited circumstances . . ."[61] Moreover, the assumption here must be that the MMMA exists and will be utilized. In that

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[58] 21 U.S.C.A. § 846.
[59] *U.S. v. Kremetis*, 903 F.Supp. 250 (New Hampshire, 1995).
[60] *United States v. Rosenthal*, 266 F Supp 2d 1068, 1078 (2003), affirmed, 454 F 3rd 943 (9th Cir, 2006).
[61] MCL 333.26422(c).

laboratory, the MMMA mandates that Michigan officials aid and abet persons who are engaged in criminal enterprise by directing that critical information be withheld

The seriousness of the obstruction to law enforcement created by Section 6(h) of the MMMA, and thus the degree of damage to law enforcement under CSA, is quite clear and distinct, and more than meets the difficult threshold for obstacle conflict preemption.

2. Exception enacted as part of the CSA.

The second *Hillman* factor directs an analysis of any exceptions to the general scheme of regulation carved out by Congress. Examination of this *Hillman* factor reveals that state authorizations involving marihuana, including those contained in the MMMA, were not contemplated by Congress in enacting the CSA. This conclusion is well-supported by the application of the rule discussed as part of second *Hillman* factor. As explained further below, in *Hillman* the rule in essence dictates that, where a statute states a general prohibition, and expressly provides an exception to that prohibition, such exception is to be considered the limit of the deviation to be permitted from the general prohibition.

The CSA pronounces the premise that Schedule I drugs are abusive and harmful, and have no redeeming value. On this basis the general prohibition stated in the CSA is that all possession, manufacture, and delivery are criminal offenses. In other words, the CSA establishes a **clear and predictable scheme of prohibition** that everyone can understand and rely on – a "promise" of arrest and prosecution for violation. With that promise follows the expectation of uniform law enforcement.[62]

Congress did explicitly include one exception in the CSA that would create no breach of the promise of uniform enforcement:

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[62] See *Hillman,* at 1953.

> By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the **sole exception** being use of the drug as part of a Food and Drug Administration preapproved research study. §§ 823(f), 841(a)(1), 844(a); * * *
>
> [T]he CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, 84 Stat. 1242-1284, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Most of those substances-those listed in Schedules II through V-"have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." 21 U.S.C. § 801(1). The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, **except as a part of a strictly controlled research project.**[63]

By establishing this one exception to the stated general prohibition, the CSA effectively announced the limit on exceptions to the uniform rule of law stated in the statute. This proposition was succinctly stated in *Hillman v Maretta*:[64]

> We have explained that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." Andrus v. Glover Constr. Co., 446 U.S. 608, 616-617, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980). Section 8705(e) creates a limited exception to the order of precedence. If States could make alternative distributions outside the clear procedure Congress established, that would transform this narrow exception into a general license for state law to override [the relevant federal law]. See TRW Inc. v. Andrews, 534 U.S. 19, 28-29, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001).

The application of this second *Hillman* factor is fatal to any suggestion that the authorization contained in MMMA should not be deemed to be in conflict with the contemplation of the Congress in enacting the CSA. The MMMA effectively represents a breach

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[63] *Raich,* at 14, 24.
[64] *Hillman, supra,* at 1953.

of the promise in the CSA for clear, predictable, and uniform treatment of drug violations – particularly in relation to a Schedule I controlled substance.

Aside from a Food and Drug Administration preapproved research study, there is to be no lawful possession, manufacture, or delivery of marihuana, medical or otherwise. The authorization contained in the MMMA is an immense conflict with this clear mandate.

3. Conclusion

Two grounds for obstacle conflict preemption exist based on the MMMA: the obstacle to drug abuse prevention which is central to purposes and objectives of CSA; and the obstacle to law enforcement to achieve drug abuse prevention and control. As evidenced in H.H.Rep No. 1444, both of these objectives represent central purposes of the CSA. Applying the two *Hillman* factors, the Court could conclude that the obstacle created by the MMMA to achieving either of these federal purposes is independently sufficient to support a conclusion of obstacle conflict preemption. Considering these obstacles together establishes a powerful and compelling basis for that conclusion.

RELIEF SOUGHT

On the basis of the arguments presented in this case, amicus curiae, State Bar of Michigan Public Corporation Law Section, requests the Court to reverse the decision of the Michigan Court of Appeals and hold that the City of Wyoming Zoning Ordinance is not preempted by the Michigan Medical Marihuana Act, and further hold that the Supremacy Clause of the United States Constitution applies on the basis of both impossibility and obstacle conflict preemption to void the MMMA in its entirety.

Respectfully submitted,

By: _____

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Dated: August 17, 2013

ATTACHMENT A
[selected portions]

H.R. Rep. No. 1444, H.R. REP. 91-1444 (1970)

H.R. REP. 91-1444, H.R. Rep. No. 1444, 91ST Cong., 2ND
Sess. 1970, 1970 U.S.C.C.A.N. 4566, 1970 WL 5971 (Leg.Hist.)
*4566 P.L. 91-513, COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970
HOUSE REPORT (INTERSTATE AND FOREIGN COMMERCE COMMITTEE) NO. 91-1444,
SEPT. 10, 1970 (TO ACCOMPANY H.R. 18583)
SENATE REPORT (JUDICIARY COMMITTEE) NO. 91-613,
DEC. 16, 1969 (TO ACCOMPANY S. 3246)
CONFERENCE REPORT NO. 91-1603,
OCTOBER 13, 1970 (TO ACCOMPANY H.R. 18583)
CONG. RECORD VOL. 116 (1970)
DATES OF CONSIDERATION AND PASSAGE
HOUSE SEPTEMBER 24, OCTOBER 14, 1970
SENATE OCTOBER 7, 14, 1970
THE HOUSE BILL WAS PASSED IN LIEU OF THE SENATE BILL. THE HOUSE REPORT AND THE CONFERENCE REPORT ARE SET OUT.
(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)
HOUSE REPORT NO. 91-1444
SEPT. 10, 1970

* * *

PRINCIPAL PURPOSE OF THE BILL

THIS LEGISLATION IS DESIGNED TO DEAL IN A COMPREHENSIVE FASHION WITH THE GROWING MENACE OF DRUG ABUSE IN THE UNITED STATES (1) THROUGH **PROVIDING AUTHORITY FOR INCREASED EFFORTS IN DRUG ABUSE PREVENTION** AND REHABILITATION OF USERS, (2) THROUGH PROVIDING **MORE EFFECTIVE MEANS FOR LAW ENFORCEMENT** ASPECTS OF DRUG ABUSE PREVENTION AND CONTROL, AND (3) BY PROVIDING FOR AN OVERALL

BALANCED SCHEME OF CRIMINAL PENALTIES FOR OFFENSES INVOLVING DRUGS.

*. * *

THE BILL IS DESIGNED TO IMPROVE THE ADMINISTRATION AND REGULATION OF THE MANUFACTURING, DISTRIBUTION, AND DISPENSING OF CONTROLLED SUBSTANCES BY **PROVIDING FOR A 'CLOSED' SYSTEM OF DRUG DISTRIBUTION FOR LEGITIMATE *4572 HANDLERS OF SUCH DRUGS. SUCH A CLOSED SYSTEM SHOULD SIGNIFICANTLY REDUCE THE WIDESPREAD DIVERSION OF THESE DRUGS OUT OF LEGITIMATE CHANNELS INTO THE ILLICIT MARKET**, WHILE AT THE SAME TIME PROVIDING THE LEGITIMATE DRUG INDUSTRY WITH A UNIFIED APPROACH TO NARCOTIC AND DANGEROUS DRUG CONTROL.

* * *

EXTENT OF THE PROBLEM

* * *

SINCE DRUG ABUSE INVOLVES ILLEGAL ACTIVITIES UNDER BOTH STATE AND FEDERAL LAW, RELIABLE STATISTICS CANNOT BE OBTAINED ON THE ACTUAL EXTENT OF DRUG ABUSE IN THE UNITED STATES; HOWEVER, IT IS APPARENT THAT THE **EXTENT OF DRUG ABUSE, PARTICULARLY AMONG THE YOUNG, IS INCREASING** GREATLY. ESTIMATES ARE THAT BETWEEN 8 AND 12 MILLION PERSONS HAVE TRIED MARIHUANA. STUDIES INVOLVING SOME **COLLEGES AND GRADUATE SCHOOLS** INDICATE THAT **50 PERCENT OR MORE OF THE STUDENTS HAVE ABUSED DRUGS AT ONE TIME OR ANOTHER**; AND TESTIMONY BEFORE THE COMMITTEE IN HEARINGS ON THIS AND OTHER LEGISLATION HAS INDICATED THAT **SUBSTANTIAL NUMBERS OF HIGH SCHOOL STUDENTS AND IN SOME CASES GRAMMAR SCHOOL STUDENTS ARE INVOLVED IN THE ABUSE OF DRUGS**.

* * *

TESTIMONY FURTHER INDICATED THAT HALLUCINOGENICS ACCOUNTED FOR THE GREATEST SINGLE INCREASE IN DRUG OFFENSES IN THE UNITED STATES.

PROBABLY THE MOST WIDELY ABUSED DRUG IN THIS CLASS WAS MARIHUANA, WHICH ACCOUNTED FOR MOST OF THE 64-PERCENT INCREASE IN TOTAL NARCOTIC AND MARIHUANA ARRESTS BETWEEN 1967 AND 1968. THE RECENT FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS INDICATED THAT **INSTANCES OF MARIHUANA VIOLATIONS HAD RISEN 200 PERCENT BETWEEN 1967 AND 1969. IT WAS ALSO ESTIMATED THAT *4573 IN CERTAIN HIGH SCHOOL AND COLLEGE ENVIRONMENTS, OVER 50 PERCENT OF ALL THE STUDENTS HAD HAD SOME EXPERIENCE WITH MARIHUANA.**

* * *

MARIHUANA

THE EXTENT TO WHICH MARIHUANA SHOULD BE CONTROLLED IS A SUBJECT UPON WHICH OPINIONS DIVERGE WIDELY. THERE ARE SOME WHO NOT ONLY ADVOCATE ITS LEGALIZATION BUT WOULD ENCOURAGE ITS USE; AT THE OTHER EXTREME THERE ARE SOME STATES WHICH HAVE ESTABLISHED THE DEATH PENALTY FOR DISTRIBUTION OF MARIHUANA TO MINORS. . . .

* * *

IN THE BILL AS RECOMMENDED BY THE ADMINISTRATION AND AS REPORTED BY THE COMMITTEE, **MARIHUANA IS LISTED UNDER SCHEDULE I**, AS **SUBJECT TO THE *4579 MOST STRINGENT CONTROLS UNDER THE BILL**, EXCEPT THAT CRIMINAL PENALTIES APPLICABLE TO MARIHUANA OFFENSES ARE THOSE FOR OFFENSES INVOLVING NON-NARCOTIC CONTROLLED SUBSTANCES. THE COMMITTEE REQUESTED RECOMMENDATIONS FROM THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE CONCERNING THE APPROPRIATE LOCATION OF MARIHUANA IN THE SCHEDULES OF THE BILL, AND BY LETTER OF AUGUST 14, 1970 (PRINTED IN THIS REPORT UNDER THE HEADING 'AGENCY REPORTS'), **THE ASSISTANT SECRETARY FOR HEALTH AND SCIENTIFIC AFFAIRS RECOMMENDED 'THAT MARIHUANA BE RETAINED WITHIN SCHEDULE I AT LEAST UNTIL THE COMPLETION OF CERTAIN STUDIES NOW UNDERWAY.'**

* * *